



FH  
[REDACTED]

**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

CWK/171330

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**PRELIMINARY RECITALS**

Pursuant to a petition filed January 06, 2016, under Wis. Stat. §49.45(5), and Wis. Admin. Code §HA 3.03(1), to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance (MA) specifically the Katie Beckett program, a telephonic hearing was held on April 14, 2016, at Waupaca, Wisconsin. The record was held open post-hearing for 56 days to allow time for petitioner to submit additional information and for another Functional Screen (FS) to be completed on the petitioner. The FS completed on May 13, 2016 again found petitioner ineligible for Katie Beckett.

The issue for determination is whether the agency correctly discontinued the petitioner's Katie Beckett MA eligibility because the petitioner does not meet the "level of care" requirement.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: [REDACTED]

Waupaca County Health and Human Services  
811 Harding St.  
Waupaca, WI 54981

**ADMINISTRATIVE LAW JUDGE:**

Kelly Cochrane  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Waupaca County. He is now 11 years old and resides with his family.
2. Petitioner is diagnosed with Autism.
3. Petitioner has an IEP under which he receives speech therapy approximately 6 times per month and occupational therapy approximately 3 times per month. He also receives 1:1 guidance and help to assist with focus.
4. Petitioner had been previously eligible for CLTS under the Developmental Disability (DD) Level of Care.
5. An annual functional screen was completed for petitioner in December 2015 and he was found to no longer meet the level of care requirements.
6. On December 3, 2015 and December 4, 2015 the issued a notice to petitioner stating that petitioner no longer the level of care requirement necessary to be eligible for CLTS and his participation in the program would end May 4, 2014.

## DISCUSSION

The CLTS program started on January 1, 2004, after the federal Department of Health and Human Services informed the state department that federal MA funding would no longer be available for in-home autism services. The department drafted and released the Interim Medicaid Home and Community-Based Waivers Manual (*Manual*) that became effective with the start of the CLTS program. The Manual also covers the Community Integration 1A and 1B programs and the Traumatic Brain Injury Waiver program. It can be found on the internet at <https://www.dhs.wisconsin.gov/waivermanual/index.htm>.

In order to be eligible, applicants to the CLTS Waivers must qualify for a Developmental Disability (DD), Physical Disability (PD) (which is separated into a Nursing Home (NH) level of care and a Hospital (HOS) level of care), or Severe Emotional Disturbance (SED) level of care (LOC) reimbursable by Medicaid in a comparable institutional setting, as determined by the Children's Long Term Care Functional Screen. See *Manual*, Chapter II, p.II-4. The LOC are described at <https://www.dhs.wisconsin.gov/waivermanual/clts-loc.pdf> (*LOC Manual*).

There was no information to suggest that petitioner would qualify under any LOC other than the DD LOC for which he had been previously eligible, and therefore I discuss that LOC in detail. I add for the SED level, that petitioner is not currently receiving or in need of involvement with the mental health service system as required to meet Criterion 3 of the SED LOC requirements. For the NH LOC, petitioner does not have a diagnosis of a medical or physical disability as required to meet Criterion 1 of the NH LOC requirements. And for the HOS LOC, petitioner does not meet the need for frequent and complex medical care that requires the use of equipment to prevent life-threatening situation for the required duration.

The DD Level of Care as discussed in the *LOC Manual* provides:

A child with an ICF/MR - Developmental Disability (DD) Level of Care has a permanent cognitive disability, substantial functional limitations and a need for active treatment. The level of care criteria is based upon the child having needs similar to people in an intermediate care facility for children with mental retardation (ICF/MR). *The intensity and frequency of required interventions to meet the child's functional limitations must be so substantial that without the intervention, the child is at risk for institutionalization within an ICF/MR.*

A child may be assigned this level of care if the child meets **ALL THREE of the criteria listed below** for Developmental Disability. The criteria are:

1. The child has a diagnosis of a **Cognitive Disability** that substantially impairs learning and that is expected to continue indefinitely; and
2. The child demonstrates **Substantial Functional Limitations** when compared to age appropriate activities that are expected to last a year or longer; and
3. The child has the **Need for Active Treatment**.

*Id.* at p. 3.

It is unclear at which point in the screen the agency determined that petitioner was ineligible, and therefore I will discuss them all. For Criterion #1, petitioner has a cognitive disability (autism), however, I cannot find that the diagnosis has resulted in this child having **substantial learning impairments** as measured by either a 30% or greater delay in aggregate intellectual functioning (based on valid, standardized and norm referenced measures of aggregate intellectual functioning), or a score of at least 2 standard deviations below the mean on valid, standardized and norm referenced measures of aggregate intellectual functioning. See *Id.* at p. 3-4. The *Manual* also states that as an example, children who do not meet the Criterion #1 would include this example:

- A child whose school testing shows evidence of learning disabilities that require a more structured educational environment plus other special modifications to address the child's individual learning style. The child continues to reason, problem-solve, and learn at a reasonable functional level even though she is behind same aged peers. *This child's functional limitations with regard to cognitive capacity do not demonstrate substantial impairments in learning and therefore this child would not meet Criterion 1.*

*Id.* at p. 4. Petitioner has an IEP under which he receives speech therapy approximately 6 times per month and occupational therapy approximately 3 times per month. He also receives 1:1 guidance and help to assist with focus in school. However, he does appear to be working at grade level and is not failing in his classwork. Accordingly, I cannot find that he meets Criterion #1. Even though the analysis is to stop here, I provide the following continued analysis for Criterion #2: Substantial Functional Limitations, which provides:

## **2. SUBSTANTIAL FUNCTIONAL LIMITATIONS**

The child demonstrates substantial functional limitations **when compared to the child's age group** and each limitation must be expected to last **at least 12 months** from the date of review. These limitations must be the direct result of the child's cognitive disability or similar diagnosis from Criterion 1, and must place the child at risk of institutionalization in an ICF/MR in the absence of extensive, consistent, and direct adult intervention to assist the child in overcoming the limitations, significantly beyond the level of intervention similar aged peers typically require.

The child must demonstrate substantial functional limitations in **ONE** or more of the following developmental domains:

1. **Communication:** A substantial functional limitation in communication is defined as a 30% (25% if under one year) or greater delay or a standard score of 2 (1.5 if under one year) or more standard deviations below the mean on valid, standardized and norm referenced measures of BOTH expressive and receptive communication functioning.

OR

2. **Social Competency:** Refer to APPENDIX A. This Appendix lists deficits in social skills by age groups that demonstrate a substantial functional limitation in social competency.

OR

**3. Activities of Daily Living:** Refer to APPENDIX B. This Appendix describes the degree of deficit a child **must** demonstrate in activities of daily living to meet a substantial functional limitation based on the child's age. One of the following requirements must be met:

...

For children 5 years of age or older, such a degree of deficit must be evidenced in at least **TWO** of the following six activities of daily living categories.

- a) Bathing or Grooming
- b) Dressing or Toileting
- c) Eating
- d) Mobility or Transfers
- e) Meal Preparation  
(18 years old or older only)
- f) Money Management  
(18 years old or older only)

**NOTE:** If the child is able to use adaptive aids or receives therapy to achieve or maintain an age-appropriate level of functioning, the child is not considered to have a substantial functional limitation. Although a child may be slower in attaining certain skills or have some limitations in function, it is not considered a substantial functional limitation unless the child consistently requires hands on assistance or intervention.

There is no evidence that he meets the Communication prong. For the Social Competency, I find that he would meet that prong. For persons 9- 11 years old, this includes someone who does not make transitions from one activity to another without disrupting others or is unable to make transitions without having his/her discomfort affect others in the group. This is evidenced by teacher and parent reports for the petitioner. Per the findings from the Functional Screen, I would also find that he meets the Activities of Daily Living prong as well as needing assistance with toileting, dressing grooming, and bathing. See *Id. at Appendix B, p. 40*. Thus I turn to Criterion #3: Active Treatment, which provides:

### 3. ACTIVE TREATMENT

The child must be in need of active treatment, which are the services an ICF/MR facility must provide under federal law. To meet this criterion a child must require a continuous active treatment program that includes aggressive, consistent implementation of training, therapies, health and related services designed to address the child's substantial functional limitations resulting from her/his cognitive deficits to achieve:

- The acquisition of the skills and behaviors necessary for the child to function with as much self determination and independence as possible; and
- The prevention of deceleration, regression, or loss of optimal functional status.

For treatment to be categorized as active it must be needed on a continuous and pervasive basis throughout the child's daily routines in home, school and community. Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program.

In summary, the child must need or be receiving planned and coordinated assistance that is individualized, intensive, interdisciplinary, implemented across environments, of extended duration, and relevant to the developmental stages associated with the child's age.

The evidence does not show that petitioner is receiving treatment to the level required here. He receives some speech and occupational therapy in school, however, I do not find this to be the intensive services

required under this prong. This child has challenges and I do not mean to diminish those challenges he faces, however, the evidence in this record does not show that he requires the kind of interventions or exhibits the kinds of behaviors that would allow him to meet the levels of care. That being said, I am persuaded by the preponderance of the evidence that his condition(s) do not rise to the level of any of the foregoing levels of care.

If the petitioner's conditions or deficits should worsen, or if the petitioner develops better documentary evidence, then he would be well-advised to re-apply. I add, assuming petitioner finds this decision unfair, that it is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions.

### **CONCLUSIONS OF LAW**

1. Petitioner does not meet institutional level of care criteria for CLTS eligibility.
2. The agency correctly denied petitioner's eligibility for CLTS services because the petitioner does not meet the "level of care" requirement.

**THEREFORE, it is**

**ORDERED**

The petition for review herein is dismissed.

### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

### **APPEAL TO COURT**

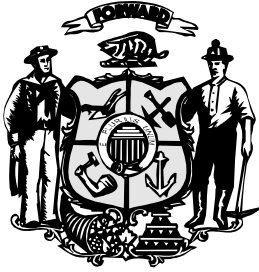
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the , , Madison, Wisconsin , **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 16th day of June, 2016

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\sKelly Cochrane  
Administrative Law Judge  
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on June 16, 2016.

Waupaca County Department of Social Services  
Bureau of Long-Term Support